No. 92-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BARCLAYS BANK PLC,
Petitioner,

v.

FRANCHISE TAX BOARD OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California in and for the Third Appellate District

MOTION FOR LEAVE TO SUPPLEMENT BRIEFS *AMICI CURIAE* AND SUPPLEMENT TO BRIEFS FOR COMMITTEE ON STATE TAXATION, ORGANIZATION FOR INTERNATIONAL INVESTMENT INC., AND UNION OF INDUSTRIAL AND EMPLOYERS' CONFEDERATIONS OF EUROPE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO SUPPLEMENT BRIEFS *AMICI CURIAE*

The Committee on State Taxation, the Organization for International Investment Inc., and the Union of Industrial and Employers' Confederations of Europe (collectively "*amici*") hereby respectfully move for leave to file the attached supplement to their briefs *amicus curiae* in this case.

The interest of COST and its 400-plus multinational corporate members in this case has been described in its brief *amicus curiae*, filed with this Court on April 23, 1993. Likewise, the interest in this case of the Organization for International Investment Inc., an association the members of which are United States subsidiaries of foreign shareholders, and the Union of Industrial and Employers' Confederations of Europe, the official representative of European business and industry vis-a-vis the European Economic Community and other European institutions, has been described in their joint brief *amici curiae*, filed with this Court on April 23, 1993. The purpose of this supplement is to address events that occurred

after the due date for filing *amicus* briefs, and the effect that the Solicitor General says those events have on the issue in this case.

A full exposition of the completely developed controversy and of potential ramifications of this case by each interested and eligible *amicus* is ultimately to the benefit of the Court in its administration of certiorari. The Solicitor General, even while admitting that "the analysis and holdings of the California Supreme Court are subject to serious question," *Am.* U.S. Br. No. 92-1384, suggests that the new legislation renders this case moot. Your *amici* would like the opportunity to explain to the Court why recent California legislation does not render this issue moot for years prior to or after the effective date of the legislation.

Respectfully submitted,

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SUPPLEMENT TO THE BRIEFS FOR COMMITTEE ON STATE TAXATION, ORGANIZATION FOR INTERNATIONAL INVESTMENT INC., AND UNION OF INDUSTRIAL AND EMPLOYERS' CONFEDERATIONS OF EUROPE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

SUPPLEMENT TO ARGUMENT

I. THE ISSUE RAISED IN *BARCLAYS* IS *NOT* RESOLVED BY THE RECENT ENACTMENT OF "WATER'S EDGE" LEGISLATION IN CALIFORNIA

California's enactment of "water's edge" legislation [1] does not resolve the issue in this case, and should not constitute grounds for a refusal by this Court to review this case.

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[1] S. B. 671 (1993), is effective for tax years beginning on or after January 1, 1994. The legislation is designed to make water's edge reporting an elective method available to the taxpayer.

First, California has not abandoned worldwide combination on an ongoing basis. Barclays itself has at least 17 taxable years either currently under audit or subject to audit, which pre-date the 1994 effective date of S.B. 671. Likewise, COST's member companies that are California taxpayers are subject to the continuing mandatory use of worldwide combination, with respect to pre-January 1, 1994 tax years. Audits and assessments against those open years will continue through the turn of the century. Moreover, the new water's edge legislation will not comport with Foreign Commerce Clause principles. For example, Canadian and Mexican and "80/20" subsidiaries are brought into a water's edge corporate group for reporting purposes, a practice that like worldwide combination violates the Foreign Commerce Clause. Therefore, in a very real sense, this issue remains viable.

Second, the question whether the worldwide combined reporting method violates the Foreign Commerce Clause continues to have significance beyond the borders of California. As long as worldwide combination is utilized by other states in addition to California, the question whether this method is unconstitutional cannot be considered "moot." Alaska, Idaho, Montana, North Dakota and Utah each use worldwide combination.

Third, the Solicitor General understates the issue when he states merely that worldwide combination is "subject to serious question." When the United States was a real party in interest in the case of *United States v. State of Alaska and Malone*, No. A87-328CIV (D. Alaska, filed July 15, 1987), it was much more candid. As stated in the Government's Memorandum of Points and Authorities in Support of Its Motion for Partial Summary Judgment, p. 10:

> The Alaska tax scheme is no different from the California tax system challenged in the *Barclays* case. The Alaska tax cannot be constitutionally applied to

> the foreign parent . . . of the domestic subsidiary . . . because the tax impermissibly interferes with the conduct of foreign affairs by the Federal Executive, taxation on a worldwide unitary basis has caused conflicts between the United States and foreign nations and led to the adoption of retaliatory legislation, and the tax contravenes established federal policy.

Respectfully submitted,

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